

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 NATIONAL STEEL CAR LIMITED,)
4 Plaintiff,) 3:20-cv-01275-YY
5 vs.) April 26, 2022
6 GREENBRIER-CONCARRIL LLC, et al.,) Portland, Oregon
7 Defendants.)

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10 (Telephonic Motion Hearing)

11 BEFORE THE HONORABLE YOULEE M. YOU

12 UNITED STATES DISTRICT COURT MAGISTRATE
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Telephonic motion hearing

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1 (April 26, 2022)

2 P R O C E E D I N G S

3 (Telephonic motion hearing:)

4 THE COURT: Good morning, Counsel. This is
5 Judge You. Before we get started, I would like to confirm
6 that we are scheduled today for a discovery hearing in
7 National Steel Car Limited versus Greenbrier, LLC. It is
8 case No. 20-cv-1275.

9 As you heard, we have a court reporter who is
10 going to be doing his best to ensure that we have an
11 accurate transcript of the proceedings, so please make sure
12 to articulate what it is you are saying, not speak too
13 quickly, particularly if you are reading, and also identify
14 yourself before making your remarks.

15 Do we have an attorney for plaintiff on the line?

16 MS. NEW: Yes, Your Honor. This is Megan New from
17 Barnes & Thornburg for the plaintiff.

18 MS. ECKERT: Your Honor, Marie Eckert from
19 Miller Nash on behalf of plaintiff as well.

20 MR. VALENZUELA: Daniel Valenzuela on behalf of
21 plaintiff as well.

22 MR. LEAVELL: Your Honor, Craig Leavell is also on
23 the line for National Steel Car, more or less just listening
24 in.

25 THE COURT: Sure. Thank you.

1 What about for the defense?

2 MR. LOVETT: Yes, Your Honor. This is
3 Steve Lovett, Oregon counsel for the defendants. Also on
4 the call are Pieter van Es, Brian Apel, and Marc Cooperman
5 who will argue on defendants' behalf.

6 THE COURT: Thank you very much.

7 As I mentioned, we are here for a discovery
8 hearing. I have a number of emails that you've provided.
9 Let me say first how helpful it has been to read your
10 emails. They are very clear and outline the issues for
11 today. I just want to confirm that no additional email was
12 submitted after April 13th, the Greenbrier email, on that
13 date.

14 Is that correct?

15 MS. NEW: That's correct, Your Honor.
16 Megan New on behalf of the plaintiff.

17 THE COURT: All right. Thank you.

18 Let me ask how you would like to proceed in
19 discussing these requests, which appear to be related.

20 MR. COOPERMAN: They are, Your Honor.

21 THE COURT: Who was speaking?

22 MR. COOPERMAN: I'm sorry, Your Honor. This is
23 Marc Cooperman on behalf of defendants.

24 THE COURT: All right. I'm wondering if we should
25 talk more broadly about the first request and then move to

1 the second request.

2 MR. COOPERMAN: That makes sense to me,
3 Your Honor.

4 Again, this is Marc Cooperman.

5 I'm happy to try and frame the issues since these
6 are issues that defendants have raised, if you think that
7 might make sense.

8 THE COURT: I would like to make one observation,
9 which is that you seem to be -- first of all, let me say
10 that in looking at the case law that has been submitted, I
11 find that this THX Limited v. Apple, Inc. case from the
12 Northern District of California to be persuasive. There,
13 the Court said: "Courts in this district have compelled
14 patent plaintiffs to provide the factual bases for their
15 damages claims through initial disclosures and written
16 discovery, over protestations that responsive information
17 will be forthcoming through expert reports."

18 I find that to be persuasive in that I don't quite
19 see why there shouldn't be ongoing discovery on the issue of
20 damages that can be supplemented and further explored during
21 the course of expert discovery. That being said, I also
22 understand that you're at a little bit of an impasse here in
23 that NSC's response -- and I'm just broadly responding
24 here -- there is some claim that NSC needs some information
25 from Greenbrier in order to adequately respond. So I wanted

1 to just point that out and ask how -- the thought that came
2 to my mind was a chicken-and-egg scenario. So I'm wondering
3 if you could talk about that at the outset so that I can
4 wrap my brain around that issue.

5 MR. COOPERMAN: Yeah. Absolutely Your Honor.
6 Again this is Marc Cooperman.

7 Of course NSC has to provide a computation of its
8 damages, and that's required by Rule 26 in its initial
9 disclosures. So we should be seeing a dollar sign and some
10 explanation of what its position is. The fact that
11 discovery is ongoing and/or may not be completed doesn't
12 excuse NSC -- this is going to your chicken-and-egg analogy,
13 Your Honor.

14 In fact, the rule, Rule 26(a), specifically says
15 that a party is not excused from making its disclosures
16 because it has not fully investigated the case. So you can
17 kind of start out maybe with a small chicken or a small egg
18 based on what the plaintiff knows.

19 We should then be able to get from them, based on
20 what they have, their preliminary damages computation and
21 then they supplement throughout the case. As Your Honor
22 said, discovery is ongoing. That's the typical case.

23 Unfortunately, here, there was nothing -- no
24 computation given to us in its initial disclosures from NSC,
25 and then throughout discovery there has been no computation

1 given to us or supplemented by NSC. We submitted an
2 interrogatory supplementing the initial disclosure
3 requirement asking for information about their damages
4 claim, the factual support -- that was interrogatory No. 13
5 that we have cited to Your Honor -- and we still didn't get
6 any sort of computation. And it is more than just the
7 dollars, right. It's an explanation of the basis for the
8 damages as well.

9 So we contacted them. And we had a dispute. We
10 couldn't resolve it, so we raised it with Your Honor, now
11 going on, I think, over two months ago. It's part of that
12 briefing that Your Honor just mentioned that NSC actually
13 promised to supplement its initial disclosures or its
14 interrogatory response No. 13. "Supplement" is an
15 interesting word, because they didn't ever provide it in the
16 first place. And they haven't, even today. Discovery
17 closed last Friday. Fact discovery closed with the
18 exception of two financial related officers from NSC that we
19 are deposing because of scheduling conflicts.

20 Fact discovery closed last Friday, and NSC still
21 hasn't provided any computation or explanation for its
22 computation, and it could have given up something and
23 continued to supplement as it receives more information. I
24 understand the chicken-and-egg saying. And sure, we have
25 been providing documents along the way, but we started --

1 Greenbrier started providing its financial information
2 before this case was even transferred to Your Honor.
3 Remember, this case started out, I think, in Texas and then
4 got transferred.

5 In Texas, we provided the names of our customers,
6 the revenues, the costs, the profitability for many of our
7 accused products. As a starting point, that was close to
8 two years ago, and we have supplemented since. The point
9 being, again, NSC could have and should have been providing
10 computations all along, and we got nothing.

11 So our position at this point, Your Honor, is that
12 by having not provided any computation of damages, and now
13 that discovery is closed, they should not be allowed to
14 claim damages.

15 That's the principal relief that we are looking
16 for on this particular issue. They shouldn't be allowed
17 to just wait and spring it on us in their expert report.
18 That's not the way it works. It's backwards. We're
19 supposed to get their factual bases and then have a chance
20 to fairly test those claims and numbers and facts and
21 evidence with their witnesses before we get to expert
22 discovery.

23 So I hope that addresses your questions,
24 Your Honor.

25 THE COURT: Thank you, Counsel. On that last

1 point that you made with respect to foreclosing NSC from
2 seeking damages because it has not provided information
3 regarding damages during fact discovery, I understand why
4 you're making that request. However, that can be easily
5 remedied by reopening fact discovery for NSC to provide that
6 information. So I just wanted to take that option off the
7 table so that we are all clear that that's not going to
8 happen, where there is an alternative remedy.

9 MR. COOPERMAN: I certainly understand
10 Your Honor's hesitance. Discovery has been going on for
11 quite some time, and I would hate for it to have to continue
12 on for a lot longer. On the other hand, we don't want to be
13 blindsided either. So I completely understand what you're
14 saying.

15 We'd request, if Your Honor wouldn't go down that
16 road of prohibiting damages, that you order NSC to provide
17 its computation of damages and its underlying facts and
18 evidence and the other things that we asked for in our
19 March 10th letter to you within a week so that we can go
20 ahead. We have these depositions on the table, as I
21 mentioned, Your Honor, of their chief financial officer, and
22 as I've said, the head of marketing and sales, both heavily
23 related to damages claims, and those are coming up in the
24 next couple of weeks. So we would ask that you order NSC to
25 provide computations and the other things that we've asked

1 for no later than a week from today.

2 THE COURT: Can you please respond to NSC's
3 statements -- it is in the last paragraph of their email
4 response -- that NSC will supplement its response to
5 interrogatory No. 13 in a reasonable time period as soon as
6 Greenbrier complies with the discovery obligations relating
7 to damages.

8 Would you please respond to that specifically.

9 MR. COOPERMAN: Sure. I think Your Honor is
10 asking about whether we have or what ongoing discovery that
11 we haven't provided that they need? Is that what you are
12 asking?

13 THE COURT: That's right. And also to -- just one
14 moment, please. I think it is addressed in a couple of
15 paragraphs in more detail.

16 MR. COOPERMAN: Would you like me to jump in?

17 THE COURT: Yes. Go ahead.

18 Anyway, it's more specifically detailed in NSC's
19 response. So what are your thoughts on what they're
20 asserting here, that they need specifically more information
21 from Greenbrier in order to be able to respond themselves?

22 MR. COOPERMAN: Sure. So a few thoughts on that.

23 First, specifically, on June 1st, 2020, so going
24 on two years ago, the case was transferred from Texas to
25 Oregon. Prior to that or right around that same time we

1 provided -- Greenbrier provided detailed cost and revenue
2 information and customer names to NSC in connection with the
3 earlier case. About a year later we gave them even that
4 much more information in June of 2021. So that was about a
5 year ago. So about two years ago we provided information in
6 the original case. Then a year ago we provided a lot more
7 information after discovery was ongoing. Let me add that
8 the first disclosure we provided was before fact discovery
9 was done, because we had this venue valve going on in Texas.

10 So NSC has had from Greenbrier specifically
11 information concerning our customer names, the revenues that
12 we sold the accused products for, the costs that were
13 associated with those accused products, and the
14 profitability. And as time has gone on, we have
15 supplemented that specifically. One of the dates that we
16 specifically supplemented on was June 8th, 2021.

17 So they have a lot of information. They should
18 have everything they need now to complete their computation,
19 but they haven't even provided an initial computation,
20 Your Honor, as mentioned before.

21 The rule, again, requires that plaintiff -- both
22 parties provide -- like I said, in this situation the
23 plaintiff, because the computation is the plaintiff's
24 burden. But they need to provide that information, their
25 computation, based on what they know at the time and then

1 supplement. And they've known a lot all along the way. So
2 they should not be allowed, even as the rule specifically
3 says, Rule 26, to hide behind the fact that supposedly
4 Greenbrier hasn't provided everything. They should be
5 providing their computation based on what we have provided.

6 Your Honor, we have provided everything that
7 they've requested. One of the ways that you can know that
8 is that NSC hasn't ever filed their own motion saying, "Oh,
9 we are missing X,Y, and Z from Greenbrier." It hasn't
10 happened. Even if arguably there was something that we
11 missed, that still, again, shouldn't stop NSC from providing
12 its computations based on what it does know. And it has
13 never provided a single computation supporting evidence of
14 that.

15 THE COURT: Can I ask you also -- and I'm sure NSC
16 wants to respond. I have just one more question for
17 Greenbrier, and that has to do with the NSC's response.
18 It's the sentence in which NSC asserts "Greenbrier refused
19 to answer any additional interrogatories on the basis that
20 NSC reached its 25-interrogatory limit and would not respond
21 to any subsequent interrogatories." Could you briefly
22 address that, and then I'll check in with NSC.

23 MR. COOPERMAN: Sure. So this is a position that
24 both parties have taken towards the end of discovery that
25 sometimes happens. So at some point we, Greenbrier, said,

1 "You're over your 25-rog. limit," and the parties hadn't
2 agreed to go beyond that. And NSC has said the same thing
3 to us and has refused to respond to interrogatories that it
4 believes is over the 25-interrogatory limit.

5 I don't know, sitting here, Your Honor, what
6 specific interrogatory NSC may be challenging that we
7 haven't answered because of the 25-interrogatory limit, but
8 I'm unaware of any information that NSC is missing that
9 would be required for its damages calculation. I don't
10 know -- I don't believe that the 25-interrogatory limit has
11 prevented us -- or has caused Greenbrier not to provide the
12 information on damages that NSC would need to complete its
13 calculation or its computations.

14 THE COURT: All right. Thank you.

15 Let me turn to NSC. Who is going to be arguing
16 today?

17 MS. NEW: Good morning, Your Honor. This is
18 Megan New on behalf of the plaintiff.

19 THE COURT: Okay. So we've discussed a lot so
20 far.

21 Is there anything in particular you would like to
22 begin with?

23 MS. NEW: Sure. I will try to kind of go through
24 the points that you raised, Your Honor, and respond to
25 Mr. Cooperman as best as I'm able. Of course, if you have

1 questions, please let me know, and I'll stop.

2 So the first thing that I want to acknowledge is
3 that we have -- and this is based on Your Honor's comment
4 about the THX case. We have provided a lot of facts in
5 response to the interrogatory, including our initial
6 analysis of the Georgia-Pacific factors, which as I'm sure
7 Your Honor knows, is part of the reasonable royalty analysis
8 that an expert would conduct.

9 The reason that we haven't been able to provide a
10 computation of damages yet is for several reasons. No. 1,
11 as I'm sure Your Honor knows, in a patent case the focus of
12 the damages number is on the defendants' profits, the
13 defendants' revenue, the defendants' pricing, how the
14 defendant sells its product, the value it assigns to the
15 patented versus the non-patented features. It is not as
16 simple as saying, "You sold X number of products," and you
17 multiply that by an arbitrary royalty rate.

18 Similarly, for the lost profits analysis, we need
19 detailed information about the defendants' revenue, to which
20 we would apply our profit margin, but we also need
21 information that would allow us to address the Panduit
22 factors that go into lost profits. So it is not a simple
23 math calculation.

24 We have been waiting for discovery on those
25 issues. There have been financial documents that have been

1 provided, but they have been -- as Mr. Cooperman just said,
2 have been supplemented over time. In fact, we are waiting
3 right now for a new supplement to address an additional
4 order that will be subject to damages. So we don't yet have
5 all of the information that we need.

6 What we also needed was a 30(b)(6) witness who
7 could explain the documents to us. As I'm sure you've seen,
8 Your Honor, these financial documents aren't very easy to
9 understand. We need to make sure we understand how things
10 like price, revenue, costs, any allocations -- relate how
11 all of that goes into reaching a profit.

12 Then we need to understand other information that
13 may not be in those documents that go into a company's
14 overall calculation of its revenues and profits related to
15 the infringing products. We were just able to take that
16 deposition last Monday, so we don't yet have the final
17 transcript for that. We, of course, will need that
18 information to do our damages analysis.

19 I think the third point importantly is that all of
20 Greenbrier's financial documents are designated "highly
21 confidential," and so they are not documents that we can
22 show to our client. They are only documents that counsel
23 and a disclosed expert can consider. So we have provided
24 that information to our expert, but as they just noted, this
25 isn't a simple rate times base calculation. There is a very

1 involved process that the experts have to go through to
2 arrive at the damages number. So providing -- we could
3 provide an estimate, a calculation now, but it wouldn't be
4 based on any of the economic or accounting considerations
5 that an expert takes into account when putting together an
6 opinion.

7 What it seems that defendants are asking for is
8 our expert opinions, if you look at the laundry list of
9 information that they are asking you to come up with to
10 provide at the end of the March 10th email. So it puts, I
11 think, an undue burden on us and our experts to go through
12 an entire casework of discovery and put together our entire
13 damages case and damages opinions.

14 I think Mr. Cooperman asked us to do that in one
15 week, and that would kind of -- it wouldn't make a lot of
16 sense, given the scheduling order. We have a date for
17 expert reports. The date is in nearly two months, and
18 that's to give the experts time to access the discovery, to
19 look at all of the depositions, to consider all of the
20 financial information, and to come up with a model and with
21 numbers that make sense and are defensible from, again,
22 accounting and economic principles. So I don't think we are
23 in a position to provide that computation. And if we did
24 provide it, I would think it would most likely be different
25 than what the expert would ultimately say at the time of

1 expert discovery.

2 With respect to your question, Your Honor, about
3 the NSC rogs. to which Greenbrier has not provided a
4 response, those are three interrogatories. They are
5 interrogatories Nos. 14, 15, and 17. Three of them relate
6 to damages. That is information that we either need or
7 would like to have before we depose their 30(b)(6) witness.

8 But in order to not burden the Court with so many
9 disputes around damages, we didn't raise it. But certainly
10 it would have been helpful to have defendants' position in
11 writing about things like profit, market share, customer
12 goodwill, demand, what Greenbrier views to be the value of
13 the infringing products, how they calculate pricing, how
14 they calculate value. Those are all things that we asked
15 for in interrogatories, and they refused to provide it. So
16 we are kind of in a situation here -- and I fully recognize
17 that it is the plaintiff's burden to prove damages. But
18 what they want is us to provide our entire expert analysis,
19 opinions, and damages numbers before the time of expert
20 opinions without giving us anything in return.

21 The last thing I would point out is that the one
22 part of both the lost profits and the reasonable royalty
23 calculation is that we have to consider whether there are
24 viable non-infringing alternatives. We served an
25 interrogatory asking defendant to identify non-infringing

1 alternatives, and they have. But they've also been
2 supplementing that interrogatory. We just received the most
3 recent supplement, I think, a week or two ago. So that is
4 other additional information that goes into a damages
5 calculation.

6 So I think we would be, Your Honor, happy to
7 provide -- if Greenbrier needs it, we would be happy to
8 provide more factual information and citation to documents
9 on which our expert may rely, but our expert needs time to
10 come up with the damages computation and to come up with the
11 opinions and the models to determine what the ultimate would
12 be. And if we're providing that -- if defendants intend to
13 provide that at the time for expert discovery, then we
14 should be allowed to do the same.

15 THE COURT: Let me ask, with respect to the
16 interrogatories, Greenbrier's counsel mentioned that both
17 parties had expressed that the limit had been reached.
18 Could some of this dispute be resolved by increasing the
19 number of interrogatories?

20 MS. NEW: I think potentially it could be. I
21 apologize, Your Honor. In front of me, I don't have the
22 exact interrogatories that we have not responded to,
23 although I believe we have provided responses up to
24 interrogatory No. 21. Defendants, I believe, stopped
25 providing responses at interrogatory No. 13. So there is a

1 little bit of an imbalance there, but I certainly think that
2 if we were able to get responses on these damages issues,
3 there may be a compromise that the parties could reach.

4 THE COURT: So one of the things that you are
5 saying is that you need some additional information from
6 Greenbrier in order to be able to come up with the damages
7 figure and also that you need your expert to do the
8 assessments in order to accurately compute damages. Just
9 broadly speaking, that's what you're saying.

10 MS. NEW: That's correct, Your Honor, although I
11 want to be very clear that we are waiting on a supplement to
12 the accused product's specific financial information. My
13 understanding is that it will be updated to just reflect one
14 additional order, but all of those orders, for reasonable
15 royalty calculation, goes into what we call the royalty
16 base. For lost profits, we need to consider that order to
17 determine whether that is a sale that NSC likely would have
18 made but for the infringement. So it would be -- without
19 that information, it would be an incomplete computation, if
20 we are talking just about numbers.

21 But as I'm is sure Your Honor knows, in a patent
22 case, there are very stringent rules about what an expert
23 needs to do to calculate damages, and there is very specific
24 considerations and factors that they need to take into
25 account. That's why we have this additional two-month

1 period after the fact discovery deadline so that the experts
2 can analyze all of that data, can figure out the right and
3 appropriate and in line with a Federal Circuit precedent way
4 to calculate damages.

5 It is not -- as I said before -- and I apologize
6 for repeating myself. It is not a simple math calculation.
7 There are a lot of components and information that goes into
8 the calculations.

9 THE COURT: All right. Thank you, Counsel.

10 Let me turn back to Greenbrier briefly and ask
11 what if, hypothetically, the case progresses as it is right
12 now, some additional interrogatories are allowed, and NSC
13 prepares its expert report, where is the harm as Greenbrier
14 sees it? Are you concerned that because fact discovery has
15 closed that you will not be able to make inquiries and get
16 information with respect to what's contained in the expert
17 report?

18 MR. COOPERMAN: Not exactly, Your Honor. Again,
19 this is Marc Cooperman.

20 It is more an issue of timing and fact discovery
21 versus expert discovery. We're focusing right now in our
22 request on fact discovery and being able to, A, on the one
23 hand, get NSC's factual position. For example, if NSC says
24 we have a 20 percent profit margin, we learn that fact
25 during fact discovery, and we learned that fact by NSC

1 providing its computation of damages and an explanation for
2 that.

3 During fact discovery, we can then challenge that.
4 We can depose their CFO, who we have scheduled to depose
5 within the next ten days -- actually, next week. Then we
6 can say, "What goes into why you believe you have a
7 20 percent profit margin?" We can challenge that. We can
8 look at their documents if we have that, and we can ask
9 questions about that during fact discovery and learn the
10 facts.

11 Then once fact discovery is over, we can then see
12 the facts and positions to our expert, and NSC can do the
13 same to their expert. If, on the other hand, we have to
14 wait to get this information as part of NSC's expert report
15 after fact discovery has closed, and we haven't had a chance
16 to ask NSC's fact witnesses, the two who are left, again,
17 their chief financial officer and the vice president of
18 marketing and sales, if we haven't had a chance to ask
19 questions during fact discovery, and based on information
20 NSC has provided us during fact discovery, then we are
21 prejudiced, because we are going to have to wait to learn
22 what these facts are in expert discovery, and that's wrong.
23 That's not the way the rules are supposed to work. It is
24 the other way around. We are supposed to get the facts and
25 information in the initial disclosures and throughout the

1 rest of discovery, factually be able to then challenge it,
2 rebut it, ask questions about it during fact discovery, and
3 then give that information to our experts and look at their
4 reports and then conduct expert discovery.

5 So there is significant harm to Greenbrier in
6 waiting for the expert's report before we get the actual
7 facts, Your Honor.

8 THE COURT: Thank you.

9 I have a question for NSC's counsel. So there are
10 a number of factors that you've identified that go into the
11 damages calculation. Of course, your expert is going to
12 have to do that computation. But the underlying factors, it
13 seems, and you identified a list of them, is known at this
14 time. So why not provide that information to Greenbrier,
15 even though you haven't done the expert calculation, as
16 Mr. Cooperman has just described?

17 MS. NEW: Well, Your Honor, at least as it relates
18 to the reasonable royalty calculation, we have provided some
19 of those facts. We did provide Greenbrier with a detailed
20 interrogatory response that walks through NSC's kind of
21 preliminary position on how the Georgia-Pacific factors
22 would affect a royalty rate, either raising the rate or
23 lowering the rate. So we have given them that information.

24 And as I said a minute ago, I think we would be to
25 supplement the interrogatory response to provide additional

1 citation to documents or other factual bases that our expert
2 may rely on. We would be happy to do that.

3 I do want to address what I think is a little bit
4 of a misrepresentation by Mr. Cooperman. He uses this idea
5 of our profit margin as an example of facts that NSC
6 shouldn't be withholding from Greenbrier during discovery.
7 Just so Your Honor is clear, that is not the case. We have
8 provided detailed financial information for the commercial
9 embodying products.

10 As Mr. Cooperman just said, they are going to have
11 an opportunity to depose our CFO next week and ask questions
12 about those financials, including information like revenue,
13 costs, and profit margin.

14 I would also like to point out that, in a patent
15 case, the focus of damages is typically on the defendants'
16 financials and the defendants' information. So we are
17 not -- Mr. Cooperman has kind of framed this to you as
18 though we have withheld all facts and information related to
19 damages, and I just want Your Honor to be clear that that's
20 not the case. Everything has been produced and provided to
21 Greenbrier.

22 If the Court is inclined to order us to move
23 forward with a supplement to the interrogatory and add that
24 information, citations to specific documents on which we may
25 rely, that our expert may rely for the damages opinions, we

1 would be happy to do that. Again, this is all information
2 that has been produced in the case. It would simply be a
3 matter of collecting the information into an interrogatory
4 response. I just want to be crystal clear that nothing has
5 been withheld, and there is not going to be any surprise
6 opinions about NSC's profit from expert discovery.

7 THE COURT: Thank you, Counsel.

8 I do want to get to the information that you are
9 seeking from Greenbrier in just a moment.

10 But I would like to go through this list of
11 requests that Greenbrier makes in its first email dated
12 March 10th. It is asking the Court to order NSC to
13 supplement its response to interrogatory No. 3.

14 MR. COOPERMAN: No. 13.

15 THE COURT: I'm sorry. Thank you. No. 13.

16 The amount of damages that NSC contends it is
17 entitled to and related computation; the amount of lost
18 profit damages NSC contends it is entitled to and its
19 computation, including NSC's profit margin and
20 identifications of sales that NSC contends it would have
21 made but for Greenbrier's alleged infringement.

22 Specifically pertaining to this that I just
23 described, what is NSC's response to that?

24 MS. NEW: Your Honor, we would be able to
25 provide -- again, we provided the financial information, so

1 we would be able to provide a 33(d) response to the document
2 that contains the profit margins. I think that would be
3 simple to do.

4 The second piece, the identification of the
5 specific sales that NSC contends it would have made but for
6 Greenbrier's alleged infringement, that is, again, I think,
7 very squarely subject to expert discovery.

8 For the lost profit calculation, there are four
9 Panduit factors that the expert is going to have to
10 consider, and there is various testimony and documents that
11 will go into identifying those sales. Certainly we have
12 provided documents that show what jobs NSC has made
13 proposals for and where those sales have instead gone to
14 Greenbrier. So Greenbrier does have that information. And
15 if they need it, we can provide them with a 33(d) response
16 identifying those documents. But identifying the specific
17 sales, again, is something that our expert will need to go
18 through and ensure that all of the Panduit factors are met
19 and that there is a reliable economic or accounting basis
20 for claiming those damages.

21 MR. LEAVELL: Your Honor, this is Craig Leavell.
22 If I could add one thing to that.

23 With respect to our clients, we have been working
24 with our clients and trying to do the best we can to get
25 their impression of which sales they think they lost out to

1 Greenbrier. But again, remember, our client and our
2 internal people at NSC are not allowed to see Greenbrier's
3 documents. They marked them all "attorneys' eyes only."

4 They don't know when they are competing against
5 Greenbrier. They may suspect it, but their customers don't
6 say "on every occasion." Rarely they give a heads-up,
7 "Okay, we are going to go with Greenbrier instead of you
8 guys."

9 So the only people who can sit through and look at
10 all of the documents and say, "Okay, it looks like this sale
11 that Greenbrier made was at the expense of NSC due to the
12 infringement" are people that have access to both sets of
13 documents, NSC and Greenbrier's. That's our experts, and
14 they are working on that and have been working on that.
15 There are hundreds of thousands of documents that have been
16 produced in this case to go through. Lawyers can sit and do
17 that, I guess, but we have been focusing on getting through
18 fact discovery and getting that done and getting documents
19 produced, getting written discovery out, and that's
20 something that we have been prioritizing that the lawyers
21 have access to both sets of documents. That's what we have
22 delegated to our experts, just to keep things -- in a
23 desperate attempt and fruitful attempt to try to keep things
24 reasonable from a cost perspective, I've delegated that to
25 the experts, and they are working on that.

1 Again, we can't just go to our client and say
2 which sales that Greenbrier made were at the expense of NSC,
3 because our client doesn't know what sales Greenbrier made.
4 They marked all that stuff confidential. So we can't go
5 tell them, "Here are all of Greenbrier's sales. Here is
6 when they made them. Here is what price they were quoting.
7 Was Greenbrier the reason you lost this sale?" It is not
8 like we can just sit with our client and do this analysis.
9 This is the realm of the experts.

10 THE COURT: Thank you, Counsel.

11 You expect, though, that your experts will be able
12 to do that analysis?

13 MR. LEAVELL: Yes, of course, eventually. And now
14 that fact discovery is closed -- almost closed, technically
15 closed but some carryover is going, they are digging in and
16 starting that analysis. They told us that it is going to
17 take them at least a month, and that's if they set things
18 aside and work more than they planned to on this case in the
19 next month, given the deadline for the report is not for two
20 months.

21 THE COURT: I understand that. I think if I were
22 to guess what Greenbrier's response would be to what you
23 just said, it's that they would like to know what that is,
24 the identification of the specific sale, so that before fact
25 discovery closes they can ask questions of NSC's employees

1 with regard to those sales. Let me just make sure that that
2 is in fact what Greenbrier is asking.

3 Is that correct?

4 MR. COOPERMAN: Your Honor, that is correct. We
5 need to be able to ask questions about the facts that we are
6 learning during fact discovery and ask those questions of
7 NSC's witnesses, Your Honor. So that's exactly right.
8 Waiting until expert discovery is putting the cart behind
9 the horse. It is not the way the rules anticipated.

10 THE COURT: An alternative would be, and I'm sure
11 nobody wants this to happen, is the experts conduct their
12 reports, then because they base some of their computations
13 on particular evidence, you reopen discovery so that you can
14 ask the people with information about, for example, "Here
15 are specific sales," you can ask for more information about
16 that. But that's just going to delay things. Then there
17 will be perhaps more information that will require the
18 experts' advice, of course. It seems like -- while I
19 appreciate that, that the experts cannot do their final
20 computations and certainly are not expected to do their
21 final computations, the information that they are going to
22 base their reports on is not subject to fact discovery,
23 isn't it? Then why shouldn't Greenbrier have information
24 about that so it can conduct discovery on the facts that the
25 experts are going to be making their decisions on?

1 From an efficiency standpoint, I don't see how you
2 can do it any other way. It sounds like somebody wants to
3 say something.

4 MR. LEAVELL: Your Honor, this is Craig Leavell.
5 I will briefly chime in, and then I'll turn it back to
6 Ms. New. They have the information. The documents have
7 been produced. The question is -- they want us to go
8 through and summarize all of the documents for them or
9 identify the relevant documents and do all of this work, and
10 that's not something that we have done yet or prioritized.

11 They have all the information. They can do that.
12 They can go through the documents. They can do all of this,
13 just like they are asking us to do. We haven't done it yet.
14 Had we done, we would tell them. We have been focused on
15 the infringement issue, the validity issue, and we have our
16 damage experts starting the damage analysis.

17 But they have all of the documents. They have all
18 of the information. They have access to those sets of
19 documents. Their lawyers could do it before the
20 depositions. It is just a matter of we haven't done it yet.
21 We are not hiding anything. We are not sitting on
22 information or positions that we have developed, but we were
23 waiting to get their information and turn it over to our
24 experts.

25 MS. NEW: Your Honor, this is Megan New.

1 THE COURT: Hold on for a moment. I definitely
2 want to hear what you have to say. Before I forget, I want
3 to also mention that we're going to, at some point, return
4 to the issue of what information NSC needs from Greenbrier.
5 I have not forgotten about that, or I don't want to forget
6 to do that.

7 So, Ms. New, you wanted to say something.

8 MS. NEW: Yes, Your Honor. Thank you.

9 I was going to add to what Mr. Leavell was saying,
10 which, again, we are talking specifically now about lost
11 profit damages. The focus of that is, again, on Greenbrier
12 sales and would NSC have made those sales. So Greenbrier is
13 well aware of what their sales were. They have documents
14 that summarize all of the sales of the infringing products
15 that they've made.

16 So if they want to question -- to follow-up on
17 Mr. Cooperman's example of what they would be able to ask in
18 depositions, if they want to ask our CFO or vice president
19 of marketing about those sales and whether NSC would have
20 made those sales and why, they have all of the information
21 they need to be able to do that.

22 Again, this is not a situation where documents or
23 information have been withheld that deprive Greenbrier from
24 the ability to ask those questions. The interrogatories are
25 sort of irrelevant to that, because they do have the

1 documents. They are their own documents. They have all of
2 the information they would need to ask those questions.

3 MR. COOPERMAN: Your Honor, may I comment on that
4 briefly?

5 THE COURT: Sure. Go ahead.

6 MR. COOPERMAN: I apologize for jumping in. I
7 have heard several times now that counsel has suggested that
8 it is defendant's documents that are the focus of those
9 damages calculations, and that's just not right. It is both
10 parties' financial documents.

11 So the fact that we have our own financial
12 documents doesn't allow us -- Greenbrier -- to calculate the
13 damages that NSC is claiming. That's again, not the way it
14 works. It is not logical. It is based on both parties'
15 financial documents and information, and that's why we have
16 come to the Court asking for help getting NSC's financial
17 information.

18 Lost profits, for example, is based on both
19 parties' financial information. The profit margin that NSC
20 makes on its products, the time, the number of cars that are
21 accused of infringing is information from Greenbrier is one
22 example. So it's really a requirement for both parties to
23 provide financial information. We can't calculate NSC's
24 damages based on what information we have from Greenbrier.

25 MS. NEW: Just so we are clear, Your Honor. This

1 is Megan New.

2 We have provided that financial information. I
3 was following up on Mr. Cooperman's example that they want
4 to be able to ask about sales that NSC contends it would
5 have made but for the infringement. My point was just --
6 the focus of that is Greenbrier's sales, and they have that
7 information. They also have our financial data.

8 THE COURT: Okay. I understand what you're all
9 saying here.

10 Let's go back to this list of items that
11 Greenbrier is requesting.

12 First, the amount of damages NSC contends it is
13 entitled to and related computations, the computations I
14 appreciate are something that the experts have to conduct.
15 I guess my question is whether at this point, considering
16 that damages calculation hasn't been conducted, I guess I
17 don't really see how NSC could provide a figure without
18 having actually performed those computations, and it really
19 would be in the form of speculation to some extent. So I'm
20 not going to require that right now.

21 There is the second request, which is the amount
22 of lost profit damages that NSC contends it is entitled to
23 and related computations, including NSC's profit margins and
24 identification of the specific sales that NSC contends it
25 would have made.

1 So I guess what I'm saying is that, although I'm
2 not requiring NSC to provide its actual computations,
3 because it is premature, and the ultimate amount that it is
4 arriving at, the bases for those computations that the
5 experts are ultimately going to make, I think Greenbrier is
6 entitled to at this point so that it can conduct its
7 discovery and for purposes of efficiency, like I've
8 described before. So I am going to require that NSC provide
9 this underlying information so that it helps to winnow the
10 issues. It helps Greenbrier understand what it is that it
11 needs to conduct discovery on at this point.

12 The next point of dispute is the amount of
13 reasonable royalty damages NSC contends it is entitled to
14 and related computations, including the total royalty base
15 and the royalty rates.

16 Let me ask Greenbrier. That appears to me also to
17 be computations that the expert is ultimately going to be
18 conducting, but tell me if you disagree.

19 MR. COOPERMAN: Ultimately that should be part of
20 an expert report, yes, Your Honor. But again, based on
21 underlying facts, for example, what is the royalty base? Is
22 it just the number of cars that Greenbrier has sold? Is it
23 the number of cars that Greenbrier has sold and leased? Is
24 it the number of cars that have been repaired; that are
25 accused of infringement? There are a lot of underlying

1 facts, going to your theme, Your Honor, that impact the
2 total royalty base. Then there are also lots of facts that
3 go into calculating the royalty rate as well, which
4 includes, as one example, the profitability of the cars and
5 the profitability of plaintiffs overall.

6 So I think we would request, if we are not going
7 to be able to get the amount at this point in time, similar
8 to what you just ordered, get all the underlying information
9 that the experts and NSC are going to rely on in support of
10 their ultimate royalty calculation.

11 THE COURT: And what is NSC's response?

12 MS. NEW: Your Honor, this is Megan New again.

13 I think we would be in a position to provide the
14 royalty base, and we can provide additional citation to
15 additional documents that the expert may rely on in support
16 of the reasonable royalty analysis. But it's the rate that
17 is really what would be the tough part there, because that
18 is, I think, strictly subject to expert analysis.

19 THE COURT: All right. So let me ask Greenbrier
20 what your thoughts are on that, the royalty rate in
21 particular.

22 MR. COOPERMAN: Well, again, Your Honor, I would
23 ask that we get the underlying facts for both the royalty
24 rate and royalty base, and that's because a reasonable
25 royalty is calculated by taking the royalty base and

1 multiplying it by the royalty rate. So there are two
2 components to the calculation. We should be able to, during
3 fact discovery, get the underlying facts for both of the
4 parts of the reasonable royalty analysis. Just having half
5 of it is an incomplete picture, Your Honor. There is no
6 reason to have any sort of patent exception to what's being
7 required by the rules. It should apply equally to patent
8 cases as well as to other cases.

9 THE COURT: What's NSC's response to that?

10 MS. NEW: Your Honor, we have already provided
11 a lot of facts related to the Georgia-Pacific analysis,
12 which is what goes into calculating the rate. As I said
13 before, we are happy to provide it. If Greenbrier needs it,
14 we are happy to provide document citation to additional
15 documents that the experts can rely on in calculating the
16 rate.

17 THE COURT: I think that whatever the underlying
18 factual information is, that needs to be provided to
19 Greenbrier. Computations, I'm not expecting, of course,
20 those to be provided at this point. But whatever underlying
21 factual information that is going to be required, that needs
22 to be disclosed.

23 MR. COOPERMAN: Your Honor --

24 THE COURT: Go ahead.

25 MR. COOPERMAN: I'm sorry to interrupt you,

1 Your Honor. I don't want to interrupt you.

2 THE COURT: Don't worry. It is really not a
3 problem, not in any way. I am not going to be offended. We
4 are on the telephone. I have no concern about that.

5 Go ahead.

6 MR. COOPERMAN: Thank you, Your Honor.

7 Just briefly, so we are all communicating really
8 well, what I'm hearing counsel say is that they are going to
9 provide perhaps a list of information that this expert might
10 rely on, and I think that may not be particularly helpful to
11 us. If we get five pages with a list of documents that most
12 of which the expert isn't going to rely on, so kind of not
13 letting us know specifically what the important information
14 is. I just wanted to raise that point, and that's part of
15 why I think -- and I know Your Honor has made a decision on
16 computation. Computations are important. It gives some
17 guidance on where this underlying evidence and facts are
18 going and kind of the results. But I think it wouldn't be
19 too helpful to Greenbrier if we get a list of 3,000
20 documents that the expert might rely on. That's not going
21 to be helpful at all. It needs to be more specific.

22 THE COURT: Could you attempt to get more specific
23 information through additional interrogatories?

24 MR. COOPERMAN: I don't think so. I think what we
25 are talking about right now is providing information in

1 response to interrogatories, and I don't see additional
2 information coming from further interrogatories. The
3 information is in -- counsel knows the information from
4 looking at the documents and from working with its expert.
5 So all I'm asking is that counsel provide a specific
6 identification of underlying documents and information that
7 it is going to use and not just overwhelm us with a boatload
8 of information that becomes effectively useless.

9 THE COURT: I understand your concern. Let me
10 just say I'm going to give the parties the opportunity to
11 follow through on what I've just said, and, of course, if
12 you feel that you are provided with information that is
13 overwhelming and not specific enough, then we can reconvene.

14 Just to make sure my intent is clear, I agree, I
15 don't think it would be particularly helpful to be provided
16 with thousands of pieces of information. I don't think that
17 that's going to further the case along. So I would
18 certainly discourage NSC from doing that. I'm not
19 suggesting that's your intention, if that makes sense.

20 MS. NEW: Your Honor, this is Megan New.

21 It does. But now I have kind of a concern on the
22 other side of this, which is, as Mr. Leavell spoke to a
23 moment ago and I have been saying throughout this hearing,
24 there is a lot of analyses that the experts have to do, and
25 that includes kind of combing through all of the documents

1 that were produced in discovery that might be relevant to
2 damages.

3 So while we certainly have no intention of
4 providing any interrogatory response that has a 33(d) cite
5 to 3,000 documents, what I'm concerned about, given what
6 defendants counsel's expectation is, is that if we don't
7 identify a document and our expert determines a couple of
8 weeks before expert reports that certain information is
9 relevant to the analysis, and we rely on those documents,
10 then once we get the expert discovery, then I'm going to see
11 a motion to strike or a motion to preclude certain testimony
12 or reliance on certain documents because they weren't
13 provided in response to the interrogatory.

14 This is back to Your Honor's comment about the
15 chicken-and-the-egg problem, which the problem with a lot of
16 these contention interrogatories is that so much of what's
17 being requested is truly expert analysis. What Greenbrier
18 is asking us to do as the lawyers is to essentially provide
19 the expert opinion and all underlying factual bases right
20 now, when our experts haven't had a chance to really do a
21 deep dive on all of the information that has been provided
22 and identify what is truly relevant and then going to be
23 relied upon.

24 We can certainly and will, of course, do our best
25 to provide what we think right now the expert might rely on,

1 and we can do so without providing a citation to 3,000
2 documents. But I don't want to run into an issue where
3 there is preclusion down the road, because, as lawyers, we
4 couldn't correctly guess what an economist or an accountant
5 might rely on for their opinions, especially in the time
6 frame that Mr. Cooperman is requesting.

7 THE COURT: I completely understand your concerns.

8 So let me just say that it sounds like NSC is
9 going to not -- NSC is going to provide the information that
10 we have been discussing in a specific way, not attempting to
11 overwhelm Greenbrier with thousands of pages of information
12 or with, I guess, the kitchen sink, so to speak.

13 As long as NSC is operating in good faith by
14 attempting to provide the information that it is aware of at
15 this time, as long as counsel is operating in good faith, or
16 if it turns out that expert relies on another piece of
17 information, well, then that might be a reason to -- if
18 Greenbrier feels it is necessary -- to reopen discovery to
19 explore that further. That's a bridge we can cross in the
20 future. We might not have to.

21 But I think that discussing this right now -- it's
22 really important that NSC brought this up. It is really
23 important that Greenbrier expressed its concern about being
24 overwhelmed with information. I'm asking NSC to provide
25 specific information to Greenbrier, but like I said, should

1 something be left out, but NSC has been operating in good
2 faith, then we will deal with that at the time.

3 All right?

4 MS. NEW: That makes sense, Your Honor. Thank
5 you.

6 THE COURT: Okay. So I'm not going to get into
7 any additional details with respect to my decision, just, as
8 you know, the underlying factual bases need to be provided
9 to Greenbrier.

10 Now, let's talk about NSC's concerns that
11 Greenbrier has not provided it with information it needs in
12 order to be able to move the case along, and that's
13 contained in NSC's response.

14 What, if anything, further does NSC want to say on
15 this issue?

16 MS. NEW: Your Honor, in the interest of
17 efficiency, I think I really have said everything that there
18 is to say, which is we are in a little bit of an imbalance
19 here, because Greenbrier refused to provide responses to
20 interrogatories that are related to our damages and other
21 information that goes into the damages analysis.

22 So we are now in a situation where we are going to
23 provide as much information as possible about our damages
24 case in response to Your Honor's order, and we will have
25 virtually -- I think we will have no information from

1 Greenbrier other than their contentions with respect to
2 non-infringing alternatives.

3 So I think in the interest of equity and fairness,
4 I think if NSC is being required to provide information
5 about its damages case, the documents it's going to rely on,
6 the facts that are relevant to the lost profits and
7 reasonable royalty falses, then I think Greenbrier should be
8 compelled to provide that information as well. Just for the
9 record, that is NSC's interrogatories 14, 15, and 17.

10 MR. COOPERMAN: Your Honor, may I respond?

11 THE COURT: Mr. Cooperman.

12 MR. COOPERMAN: Thank you. This is really truly
13 the first time that we have heard from NSC about any
14 concerns about those interrogatories responses. As far as I
15 know, and I'm kind of relying on the rest of the team on the
16 call to supplement, I don't believe we've received any
17 suggestion from NSC previously that we need to supplement
18 those interrogatories. What I would suggest -- I think, in
19 other words, the issue is premature.

20 Now, we have correspondence. We have had
21 meet-and-confers about the issues that Greenbrier had raised
22 in discovery with NSC, but NSC hasn't said, "Hey, let's have
23 a meet-and-confer and try to work this out." So instead of
24 just asking for broad relief when the parties haven't
25 specifically hashed it out, I would suggest, Your Honor,

1 that the parties be given an opportunity to talk about and
2 see if we can work out the issues that NSC may have that we
3 haven't had an opportunity to deal with before, and then if
4 it is necessary, come back to Your Honor.

5 THE COURT: This argument was asserted in the
6 response, and Greenbrier did file a reply here, or responded
7 to an email reply. I think that really means we should
8 resolve this today rather than kicking the can down the road
9 as it pertains to NSC's interrogatories 14, 15, and 17.

10 MS. NEW: That's correct, Your Honor.

11 THE COURT: In the response email. Oh, I see.
12 14, 217.

13 MS. NEW: Your Honor, I apologize. It is 14
14 through 17.

15 THE COURT: That's my speed reading. I apologize.
16 Just generally speaking, Greenbrier has not
17 responded to those, because of the interrogatory limit; is
18 that correct?

19 MS. NEW: Correct, Your Honor. Like
20 Mr. Cooperman, I'm going to have to defer a little bit to my
21 colleagues here. But my understanding is that Greenbrier's
22 position is, in view of some parts of other interrogatories,
23 Greenbrier's position is that our 25 interrogatory limit
24 really ended at interrogatory No. 13. So anything beyond 13
25 they refused to provide a response.

1 MR. LEAVELL: This is Craig Leavell. I can speak
2 to that. It's a patent case. There are several accused
3 products. There are several purported items of prior art.
4 So as is very often the case, the interrogatories, in an
5 effort to be detailed and provide guidance as to what
6 they're looking for, with the type of information we are
7 asking for, they treated those as subparts, counted our
8 first 12 interrogatories as 25, and then refused to answer
9 anything after that. Since they were doing that, and didn't
10 answer anything after 12, we calculated how best we thought
11 they were counting, and we stopped after 21 or so.

12 I think what we should do is pick a date and both
13 sides respond. We provide the information we've already
14 discussed in response to their interrogatory 13, and they
15 provide the factual basis and identification of documents in
16 response to those four interrogatories on damages, and we
17 just do it on the same dates.

18 THE COURT: Mr. Cooperman, any reason your client
19 cannot respond to 14 through 17?

20 MR. COOPERMAN: Your Honor, I expect not. I
21 expect we can. I don't know off the top of my head, and I
22 apologize what each of those interrogatories goes to. But
23 what I would suggest we do is, since we're dealing with
24 interrogatories over which party believes is 25, let's do
25 this even-handed. If Greenbrier is going to be required to

1 answer interrogatories that they believe is over 25, then
2 NSC should do the same. Then we pick a date for an exchange
3 of interrogatory responses to complete all of the
4 interrogatories that the parties have supplemented and not
5 making it one-sided.

6 THE COURT: I thought that's what Mr. Leavell had
7 said.

8 Did I mishear that?

9 MR. LEAVELL: Your Honor, thank you. This is
10 Craig Leavell. I was speaking about the damages
11 interrogatories, the three or four they haven't answered,
12 and the one that they filed in their email requesting.
13 There are a lot more interrogatories out there. We served a
14 bunch more that they haven't responded to. They have served
15 two or three that we haven't responded to. I don't know off
16 the top of my head what's all in that. I don't know that I
17 can commit to any particular date by which we can respond to
18 the last two or three interrogatories.

19 I thought that Mr. Cooperman could give a firm
20 date when they could respond to the other 12 interrogatories
21 that we served that they didn't answer. My proposal was
22 limited to the damages topics, because that's what this call
23 has been about. I'm happy to talk on this call or
24 independently with Mr. Cooperman about the
25 non-damages-related interrogatories.

1 THE COURT: I would prefer to not talk about any
2 non-damages issues right now.

3 MR. LEAVELL: I agree, Your Honor.

4 THE COURT: Are you saying that there are four
5 damages-related interrogatories that are outstanding by NSC,
6 and how many damages interrogatories are outstanding by
7 Greenbrier?

8 MS. NEW: Your Honor, this is Megan New. We have
9 four outstanding interrogatories that relate to damages. As
10 I understand it, the interrogatory related to damages that
11 Greenbrier has served on NSC is the one we just talked about
12 and that we will be supplementing.

13 THE COURT: All right. Mr. Cooperman, are you
14 suggesting that because NSC gets four extra damages-related
15 interrogatories that you should also get four extra damages
16 interrogatories?

17 MR. COOPERMAN: No. I wasn't specifically
18 suggesting that, Your Honor. I was suggesting that both
19 parties answer all outstanding interrogatories and not use
20 the 25 interrogatory limit as some sort of shield, so that
21 it is even-handed.

22 THE COURT: Okay. I'm not going to get into all
23 of the other possibly outstanding interrogatories. I am
24 going to expand the interrogatory limit for NSC's
25 outstanding interrogatories. You can work out a date by

1 which those interrogatories have to be answered. As I
2 understand it, we have already resolved the issue with
3 respect to Greenbrier's interrogatory.

4 Is there anything else on that?

5 MR. COOPERMAN: Your Honor, can we just add in,
6 because I'm uncertain on this call if there are -- are you
7 still there?

8 THE COURT: Yes, I'm still here. I think that
9 means that somebody left the meeting.

10 MR. COOPERMAN: Got it. I was going to suggest
11 that for the order that, to the extent there is any
12 damages-related interrogatories that Greenbrier has asked
13 NSC for that haven't been responded to, again, to be
14 even-handed, if we just wanted to narrow it to
15 damages-related interrogatories that both parties need to
16 complete responding to damages relating to interrogatories
17 by some date, so it is even-handed.

18 THE COURT REPORTER: Counsel, who was speaking?

19 THE COURT: That was Mr. Cooperman.

20 THE COURT REPORTER: Thank you, Judge.

21 THE COURT: Any objection to that from NSC?

22 So Mr. Cooperman is suggesting that, should there
23 be fully outstanding damages related interrogatories from
24 either side, that they shall be answered -- any outstanding
25 ones, including the four outstanding ones that NSC has

1 noted.

2 MR. LEAVELL: Your Honor, this is Craig Leavell.

3 I don't know if there are any other outstanding
4 ones that NSC has received related to damages. I'll ask
5 that those on the call know that. I agree with the general
6 proposition of fairness. I think the question then is what
7 timing? I think we are prepared and ready to discuss their
8 interrogatory 13 and have a feeling for how quickly we might
9 be able to do that. But it's hard for me to say or to pick
10 a date by which we can respond to anything else, assuming
11 there is anything else. I just don't know what it is.

12 THE COURT: Sure. I'm going to ask the parties to
13 work out the dates, because I don't know the amount of time
14 that Greenbrier is going to need to answer those four
15 outstanding interrogatories. I am just going to ask you to
16 confer and try to agree on a date for that.

17 MS. NEW: That makes sense, Your Honor.

18 THE COURT: Okay. I want to make a quick note.

19 Finally, moving to the April 13th email from
20 Greenbrier, what, if anything more, Mr. Cooperman, would you
21 like to say on that?

22 MR. COOPERMAN: Not much, I don't think. There
23 are two issues to try and figure out how to frame that
24 email. One of the issues, there has been a development
25 since the briefly, and so that may be worth talking about

1 for a couple of minutes.

2 On Friday, this last Friday, on the last day of
3 fact discovery, actually after close of fact discovery, NSC
4 sent us a chart with information on it, and we are in the
5 process of reviewing the chart. This may relate to our
6 interrogatory No. 14 that is the subject of one of the two
7 issues we raised in our April 13th email to you. We're just
8 not sure, because we have only had it for one business day,
9 and so we need time to evaluate it.

10 So what I would suggest, Your Honor, is that you
11 just stay that particular issue with regard to interrogatory
12 No. 14, which asks for NSC's costs and profits of its
13 patented cars, because maybe we have that. NSC hasn't
14 actually supplemented its interrogatory response, so we are
15 not sure there is a clear connection between the documents
16 they provided and interrogatory No. 14.

17 But if we can be granted leave to come back and
18 raise this issue with Your Honor or continue this issue with
19 Your Honor, if it turns out that this issue still exists. I
20 just don't want to spend the time if there is not going to
21 be an issue, and I can't tell if there is an issue or not,
22 if that makes sense.

23 THE COURT: That makes sense to me. Thank you for
24 making that suggestion.

25 So then what else needs to be resolved?

1 MR. COOPERMAN: So the other issue, Your Honor, is
2 Greenbrier's request for the company-wide financial
3 information -- and this goes to our request for production
4 109 and our 30(b)(6) topic, No. 27.

5 So basically what NSC has provided to us financial
6 document-wise relates to its sales and revenues and costs
7 for its patented cars that it sells, but it hasn't provided
8 company-wide financial information, and that is recognized
9 in the case law, and we cited the cases to you, Your Honor,
10 to be relevant to both lost profit analysis and the
11 reasonable royalty analysis.

12 So, for example, under lost profits, if NSC were
13 to say, our damages calculation is based on a 20 percent
14 profit margin; that we, NSC, have a 20 percent profit margin
15 on our patented cars, but it turns out that the company, on
16 a company-wide basis has only a 10 percent profit margin,
17 then that's relevant to our ability to challenge their
18 20 percent profit margin. That includes things like
19 indirect costs, costs that would be reflective of paying the
20 lease on the building, paying the electricity, and paying
21 salaries. Those sorts of costs may not have been allocated
22 in NSC's profit margins for the particular cars at issue.

23 So this is a level of higher information, and this
24 should be information that is readily available to NSC in
25 their financial statement, and it's the type of information

1 that's given in patent cases, because it does relate to lost
2 profit and to reasonable royalty. And we can show you the
3 cases where that has been required, Your Honor.

4 About the only real response that NSC has had
5 seems like -- that this is super secret, confidential. We
6 are a private company, and we shouldn't have to provide this
7 information. Of course, there is a protective order in
8 place. This is information that they no doubt generate,
9 regardless of whether they are a private company or not.
10 This is, again, the type of information that we need to
11 fairly challenge their damages claims and calculations.

12 I think that's it.

13 THE COURT: All right. I understand.

14 I noticed before, and I think you answered, NSC
15 did not email any response to this last email; is that
16 correct?

17 MS. NEW: That's correct, Your Honor. After
18 Greenbrier sent their email over, I think Ms. Hunt emailed
19 us pretty quickly thereafter just setting the hearing. So
20 we were unsure about whether we should give the Court more
21 paper, so we did not respond.

22 THE COURT: Thank you.

23 MS. NEW: You're welcome.

24 THE COURT: I understand why you chose to respond
25 and have the hearing instead. I won't fault you for not

1 sending another email. This can be handled in a number of
2 effective ways.

3 What is your response?

4 MS. NEW: Sure. So let me start with
5 interrogatory No. 14 issue, the one that Mr. Cooperman
6 suggested that we table and potentially continue. We did
7 provide that information in a document to Greenbrier last
8 week. We did not supplement the interrogatory response to
9 include that information, because we were waiting to see
10 what would happen today with the other issues, so we could
11 do one supplement all at once. So we have already provided
12 the document, and we will just provide a supplemental
13 response to interrogatory No. 14 with the information in
14 that document. So I think that should resolve that issue.

15 On the question of the company-wide financials,
16 contrary to what Mr. Cooperman said, which is the only
17 reason NSC has provided that we shouldn't have to produce
18 this information, that it's super secret, the information is
19 also not relevant.

20 The focus of the damages analysis is going to be
21 on the accused cars, Greenbrier's accused cars, and on NSC's
22 profit margin for its embodying products, and that's the
23 information that we have provided.

24 So the company-wide financials just aren't
25 necessary. Greenbrier has cited to three cases in their

1 April 13th email. I just want to note that in each of those
2 cases, there were very specific reasons that the Court
3 ordered those company-wide financials. One was because the
4 defendant said they were going to take the analytical
5 approach to damages and so -- one of those parties had
6 convinced the Court that the company-wide financials was
7 relevant to that. That was actually the case, I think, in
8 two of the cases. Then in one of the other cases, an expert
9 submitted a declaration saying that they needed company-wide
10 financials to calculate one specific cost, which was an
11 overhead rate. We don't have any of those issues here.

12 We have provided all the information that
13 Greenbrier says company-wide financials are relevant to is
14 information that is either provided in the document that we
15 have already produced or can be addressed through NSC's
16 30(b)(6) witness on -- I believe it is topic 26, which
17 relates to the accused gondola, the embodying
18 gondola-specific financials.

19 So this is all information that Greenbrier says it
20 needs, I think in the fifth paragraph of the email, is all
21 addressed either through that document or through deposition
22 testimony.

23 There is no reason that we need to provide the
24 company-wide financials. I do think it is also -- as much
25 as Greenbrier has contended that they need our company-wide

1 financials, they have not produced company-wide financials.
2 So I think that kind of goes to show that they know this
3 stuff is really irrelevant, and it is more of a fishing
4 expedition than anything else.

5 MR. LEAVELL: Your Honor, this is Craig Leavell
6 again. If I could just add a little bit more background on
7 this. I'll try to be brief.

8 NSC is a private company. It has always been a
9 private company. That means a lot more than just a
10 nonpublic company. The deponents -- the witnesses in this
11 case don't have access to this information. There is one
12 gentleman who runs the company, and he keeps this type of
13 company-wide information very, very tightly held.

14 Our witnesses will be able to explain how we
15 calculated fixed cost on the gondola cars, the cars relevant
16 to this case. They can ask specific questions about how
17 those costs are allocated and what other projects they might
18 be allocated to. But the company-wide profitability, the
19 company-wide profit margin is not even known to these
20 witnesses.

21 So it's just not shared outside of the CEO. It is
22 very, very confidential; very tightly held, and it has been
23 for decades. I view this as them just trying to -- they
24 recognize that's an issue with the leadership of our
25 company, and Greenbrier is pushing for it just to try to

1 impose discomfort and punish National Steel Car for trying
2 to enforce its intellectual property rights.

3 There is no company-wide information that is
4 necessary. They are free to ask how we calculated the fixed
5 costs and the costs that are in the segments -- the relevant
6 segment. They will answer that. But they don't need
7 company-wide information for that; certainly not
8 company-wide profitability.

9 MR. COOPERMAN: Your Honor, may I respond?

10 THE COURT: Yes, of course. One moment.

11 Let me ask NSC if you have any legal authority
12 that you would like to share on that issue. And if you
13 don't have it right now, that's fine. If you want to
14 provide it at a later time, I want to give you an
15 opportunity to do so.

16 MS. NEW: Your Honor, this is Ms. New. We don't
17 have it handy, but we can certainly provide it.

18 THE COURT: All right. I think I probably
19 indicated to you that I would like to look into this issue a
20 little bit more and wanted to see if there is any authority
21 that NSC wanted to provide. I would like to hear from
22 Mr. Cooperman, and I also want to be mindful of the court
23 reporter and the fact that we've been going for an hour and
24 a half. I believe that he is also not available after
25 11:00.

1 MR. COOPERMAN: I'll try to be brief, Your Honor.
2 In every case that I've ever been involved in, a patent case
3 that I can think of, this information, company-wide
4 financial information, has been provided and is important to
5 the lost profits and reasonable royalties analysis for the
6 reasons we stated in our email and for the reasons stated on
7 the phone. I've just never seen a case where the
8 information is considered irrelevant, because it is not. It
9 is very relevant to the case. We're not going after this
10 information to try and somehow create pain for the
11 plaintiffs, not at all.

12 Instead, we are trying to get the information so
13 that we are not going blind into depositions and so that we
14 have a fair -- all we're asking for is a fair opportunity to
15 question and challenge statements. If we don't have the
16 financial information and we're asking -- and if we don't
17 have the documents from NSC, how can we fairly depose
18 witnesses about cost information?

19 The fact that NSC treats their own information
20 super confidential shouldn't prevent Greenbrier --
21 Greenbrier shouldn't be punished by not being able to --
22 and, of course, it's Greenbrier lawyers with a protective
23 order in place. We shouldn't be punished by not being able
24 to see that confidential information.

25 If it's so confidential, NSC shouldn't have been

1 asking for damages in the first place. They put this issue
2 into play. They are asking for lost profits and reasonable
3 royalties, and it is only fair that we get to defend
4 ourselves, and that's what this all relates to. This is all
5 very relevant information. We explained why in our email.
6 Hopefully that makes some sense.

7 MR. LEAVELL: Your Honor, if I may. This is
8 Craig Leavell.

9 So the profitability of different products lines
10 that are not the gondola car products -- that's a particular
11 type of railcar. NSC makes several different kind of
12 railcars that are not at issue in this case. Some may be
13 more profitable than others. It makes sense that the
14 gondola cars are more profitable, because we have a whole
15 portfolio of patents protecting those, and we are supposed
16 to have that exclusive right to market the patented
17 invention.

18 So if the profitability of these products are
19 higher than the overall company profitability or the
20 profitability for other product lines, that's not unusual,
21 and it's irrelevant. The costs -- I understand the
22 allocation of fixed costs -- overhead, space, those kind of
23 things and how they get allocated company wide, or how we
24 calculate the allocation of those fixed costs to the gondola
25 product line, that is in the documents. The line items are

1 there. They can ask the CFO about how that's calculated.

2 He can explain how those costs are calculated.

3 But that's not what they are asking for. They are
4 asking for all company-wide information, including
5 profitability of the company as a whole, and all sorts of
6 other things that go well beyond the allocation of fixed
7 costs to the gondola car product line. That's where I think
8 the potential relevancy would end, and they are free to
9 ask -- and we produced the spreadsheet that had that
10 information. They are free to ask the CFO under oath what
11 he knows, and I think we have even designated him as a
12 30(b)(6) witness on some of these topics. They can ask him
13 about that. He can explain the costs.

14 If there are certain particular cost documents
15 about the allocation of costs to the gondola line that they
16 think is relevant, we are willing to discuss that. But the
17 company-wide information, it is just something that is
18 not relevant, and it is not something that needs to be
19 produced.

20 MR. COOPERMAN: Your Honor --

21 THE COURT: Go ahead, Mr. Cooperman.

22 MR. COOPERMAN: Your Honor, all I was going to say
23 is that we have a fundamental disagreement about what's
24 relevant and what's not relevant in a patent damages case.
25 We would be happy to supplement our authority on this issue

1 as well.

2 THE COURT: Well, I do want to give it some more
3 thought and consider the authority that you can provide.
4 What is the reasonable time frame in which to provide me
5 with additional authority?

6 Also, I'm not looking for additional briefing. I
7 think the issue is pretty straightforward. But if there are
8 cases that you want to provide to me with like a very brief
9 explanation as to what in those cases I should be looking
10 for in particular, I think that would be the most helpful.
11 You can provide me with a list of cases. Then just point to
12 the particular page number or quote that you think is
13 helpful.

14 How much time would you like to do that?

15 MS. NEW: Your Honor, this is Ms. New.

16 I think we could provide something by the close of
17 business on Thursday.

18 Is that acceptable to the Court?

19 THE COURT: It is completely acceptable to me.

20 I'm more concerned about your schedules and what
21 other commitments you have. I am very flexible in how much
22 time you need.

23 MR. COOPERMAN: That's fine with Greenbrier too,
24 Your Honor.

25 THE COURT: Okay.

1 Well, if that's what you would like to do, then
2 that would be fine. By close of business on Thursday. If
3 you need more time, just confer and let me know. I think
4 you can submit that by email, if you would like. That would
5 be fine. You don't have to file it. It is really up to
6 you.

7 MS. NEW: Your Honor, I believe we have been
8 using -- we have been addressing emails to Ms. Hunt. Is
9 that where we should treat that same email address and send
10 it to her attention?

11 THE COURT: Yes, that would be great.

12 Okay. Then. All right. Anything further for
13 today?

14 MS. NEW: Nothing for the plaintiff, Your Honor.

15 MR. COOPERMAN: This is Marc Cooperman.

16 I just wanted to mention that there are a handful
17 of other discovery issues that we have raised with NSC in
18 correspondence, and we are hopeful that we will get them
19 worked out with them, but we may need your assistance again.
20 I just wanted to let you know.

21 THE COURT: I appreciate that heads-up, and also I
22 apologize that it took so long for me to get to your dispute
23 this time. My intention is that it is not going to take
24 that much time if you have to return. March was a busy
25 month because of other criminal calendar today duties I

1 had -- more than usual is what I'm trying to say.

2 I had additional responsibilities than what I
3 usually have. That's fine. You can just let Ms. Hunt know
4 that you have additional matters that you need to discuss.

5 I'm not going to be issuing a written order today.
6 I have indicated on the record what the ruling it is. I've
7 made detailed notes that I can refer to, if necessary, in
8 the future, and, of course, there is also a record, an
9 official transcript that you can obtain of these proceedings
10 if you would like.

11 All right then. Anything else from NSC?

12 MS. NEW: No, Your Honor.

13 THE COURT: Okay. Well, thank you very much. I
14 will wait for your submissions.

15 Thank you. We will be in recess.

16 MS. NEW: Thank you, Your Honor.

17 MR. COOPERMAN: Thank you, Your Honor.

18 (Court adjourned.)
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I certify, by signing below, that the foregoing is
a correct transcript of the record of proceedings in the
above-entitled cause. A transcript without an original
signature, conformed signature, or digitally signed
signature is not certified.

/s/ Dennis W. Apodaca

May 20, 2022

DENNIS W. APODACA, RDR, RMR, FCRR, CRR
Official Court Reporter

DATE

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